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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

10 **PETITION TO AMEND AND**
11 **DELETE CERTAIN FASTAR**
12 **RULES**

Supreme Court No. R-20-0014

13 **COMMENT OF**
14 **THE STATE BAR OF ARIZONA**

15 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the State Bar of
16 Arizona (the “State Bar”) hereby submits the following as its comment to the above-
17 captioned Petition.

18 A pilot program designed to speed case resolution and promote jury trials
19 (“FASTAR”) is in its third year in Pima County. While that program continues,
20 there are two petitions before this Court concerning FASTAR. The first, Petition R-
21 20-0012, is from the Presiding Judge of the Pima County Superior Court and
22 petitions this Court to permanently adopt, within Arizona’s civil rules, the FASTAR
23 rules with some modifications. The second, Petition R-20-0014, is from a
24 practitioner with experience in FASTAR cases and asks this Court to significantly
25 modify FASTAR rules, easing the admission and use of medical records. Petition R-

1 20-0014 also asks the Court to abolish the option of arbitration within the FASTAR
2 program. Because the State Bar recommends extending the pilot program for further
3 study of FASTAR, as set forth in our Comment to Petition R-20-0012, we suggest
4 deferring considering the second petition. But if this Court considers this Petition
5 now in substance, the State Bar recommends adopting the changes with respect to
6 medical records but not arbitration.
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9 **I. This Court Should Defer Consideration of This Petition Until It**
10 **Determines Whether to Adopt the FASTAR Program Permanently,**
11 **or to Extend the Pilot Program Further.**

12 As noted in the State Bar's Comment to Petition No. R-20-0012, filed
13 concurrently herewith, this Court, in October 2017, established a three-year "pilot
14 program in Pima County under which plaintiffs can opt for a short trial in court
15 instead of compulsory arbitration," called FASTAR. *See* Admin. Order 2017-116
16 (Oct. 26, 2017). The purpose of the program was to study the short trial program
17 and to consider whether the innovation was effective, and if so, whether it should be
18 used more widely than in Pima County. This Court has already received two reports
19 concerning FASTAR (submitted as Exhibits A and B, Petition R-20-0012). The
20 FASTAR pilot program presently continues through October 31, 2020. After the
21 program is complete, this Court can determine whether it wishes to adopt the
22 program, extend the study, or proceed in any other fashion. (As noted above, the
23 State Bar recommends further study of FASTAR.)
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1 Whatever approach this Court takes, amending the rules to delete the option
2 for arbitration in the middle of the program would injure this Court's experimental
3 design. While the State Bar believes it can be appropriate to amend rules amid an
4 experiment in some circumstances, the proposed amendment involving arbitration
5 would eliminate an alternative that many litigants are choosing. Eliminating it
6 would not only frustrate the choices of some litigants, but it would foul the data set
7 causing ambiguity in the successfulness of this pilot program.
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10 This Court's recent three-year experiment with the Commercial Court is
11 consistent with the suggestion that Petition R-20-0014 is premature in advocating
12 for the elimination of the arbitration option. With the Commercial Court, this Court
13 allowed the process of the three-year trial before making changes. This process gave
14 the experiment the chance to work and to inform a truly longitudinal evaluation of
15 the program's promise and improvement opportunities. A longer evaluation is also
16 warranted here, with the arbitration provisions intact, in order to obtain better data
17 on the promise and improvement opportunities for FASTAR. The suggestions in
18 Petition R-20-0014 may still be raised when the third report concerning FASTAR is
19 delivered to the Court this fall. That timing will allow all stakeholders to weigh in,
20 such as the Pima County bench, other judicial officers from around the state who
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1 have interest in the program, counsel who have participated in the program, and the
2 Pima County Bar Association, among others.
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4 **II. If This Court Reaches the Merits of Petition R-20-0014, It Should Reject**
5 **the Call to Abolish Arbitration, But Embrace the Proposal to Ease the**
6 **Admission of Medical Records.**

7 **A. The Petition's Request to Abolish Arbitration in FASTAR Cases Is**
8 **Not Well-Founded and Should Be Denied.**

9 The Petition asks this Court to abolish Alternative Resolution, which is a form of
10 mandatory arbitration, as an alternative to the FASTAR trial option. This is unwise,
11 for several reasons. The data cited in the Petition is from the Petitioner's own
12 experience (p. 3, Petition R-20-0014), rather than the cumulative data across both
13 reporting years as reported by the Presiding Judge (Exhibits A and B, Petition R-20-
14 0012).
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16 First, as noted above, the design of FASTAR's pilot program was to permit
17 participants to elect between arbitration and a FASTAR trial. Elimination of
18 arbitration from this program would undo the utility of this data by beginning a
19 revised pilot project, in which only a FASTAR trial is allowed. Not only would that
20 frustrate this Court's experimental design, but it would ignore the fact that most
21 participants in the FASTAR program elect Alternative Resolution – 55.8% in the
22 2018 reporting period, 58.5% in the 2019 report (chart, p. 13, Exhibit B, Petition R-
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1 20-0012). Alternative Resolution is an appealing aspect of FASTAR, so the request
2 to abolish it is premature for the integrity of the data and its actual usage rate.
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4 Second, if FASTAR is adopted in the civil rules, as suggested by Petition R-20-
5 0012, then abolishing arbitration would create an undesirably stark difference among
6 counties in Arizona's legal community. Instead of FASTAR trials as an option for
7 litigants, the state could become a hodgepodge of counties in which there was only
8 arbitration or only FASTAR. Especially given that most cases filed in Arizona
9 concern dollar amounts under \$50,000, the discontinuity would be very stark. The
10 degree of variation in local practice should not be so great in a state in which there
11 is one set of general civil rules and lawyers are licensed to practice throughout the
12 state.
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15 Third, the resulting outright abolition of arbitration in counties adopting
16 FASTAR is in significant tension with the design of A.R.S. § 12-133, which requires
17 the Superior Court in each county to maintain compulsory arbitration.
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19 Fourth, the Petition's argument that lawyer arbitration is bad because arbitrators
20 purportedly lack civil litigation expertise and do not want to be "bothered," is in
21 conflict with A.R.S. § 12-133 and Ariz. R. Civ. P. 72-77. Petitioner's conclusions
22 about mandatory arbitration are not consistent with Arizona's justice system outside
23 FASTAR.
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1 Finally, a majority of cases in the FASTAR program still select arbitration: 540
2 of 967 cases in 2018, and 586 of 1002 cases in 2019 (chart, p. 13, Exhibit B, Petition
3 R-20-0012). The comparative data, for 2015, showed that 793 cases were subject to
4 compulsory arbitration (p. 9, Exhibit B, Petition R-20-0012). This shows that
5 arbitration is chosen by many litigants and continues to serve its intended function
6 in the FASTAR program.
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9 This Court should reject the Petition's proposal to eliminate Alternative
10 Resolution within the FASTAR pilot program, as it provides a significant avenue for
11 case resolution.
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13 **B. The Petition's Proposal to Ease the Admission and Use of Medical**
14 **Records Is Helpful and Should Be Adopted in Some Fashion.**

15 Based on input received from civil practitioners, the State Bar agrees that medical
16 records take up too much expense in many smaller-dollar lawsuits, eroding the
17 benefit and promise of litigation. For this reason, while the State Bar favors
18 continuing to study FASTAR, the State Bar also favors the modification in this
19 proposal to ease the admission of medical records. The Petition's proposal of a
20 rebuttable presumption of the reasonability of the dollar amounts billed in medical
21 records is one that would keep litigation leaner, cheaper, and faster on the whole,
22 consistent with the spirit of FASTAR and the goals of the Committee on Civil Justice
23 Reform. As the Petition correctly notes, medical bills will likely only be challenged
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1 for their reasonability when the amounts are obviously unreasonable. The proposed
2 change would thus reduce unnecessary friction in the litigation process. Both
3 plaintiff and defense practitioners, as well as some trial judges, see merit in this
4 proposal.
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6 Because the proposal would change the balance between plaintiff and defendant
7 in injury litigation, the State Bar believes that a broader and more deliberate
8 discussion of this change could be helpful. One of the issues to be discussed, which
9 the State Bar flags without expressing a position at this time, is what the proper
10 evidentiary presumption is with respect to the reasonability of the dollar amounts
11 billed in medical records. It is likewise possible that further altering rules of evidence
12 in FASTAR proceedings to suspend the collateral source rule in some circumstances,
13 or to permit expert testimony by affidavit, or other innovations, could speed and
14 streamline FASTAR proceedings. As suggested above, these considerations could
15 form part of a deliberation about the future of FASTAR at the close of the pilot
16 program, whether that is at the end of this year, as presently scheduled, or later, as
17 the State Bar's Comment on Petition R-20-0012 suggests.
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22 The State Bar additionally notes that its conditional recommendation of adopting
23 the presumption that the dollar amounts of services rendered by medical providers
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1 were reasonable in no way changes or bears upon the different evidentiary question
2 as to whether treatments were medically necessary in the first place.
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4 **CONCLUSION**

5 For the reasons provided above, the State Bar respectfully submits that this
6 Court should either defer consideration of this Petition to allow further study of
7 FASTAR, or if it reaches the Petition's merits, it should deny the Petition's request
8 to abolish Alternative Resolution in FASTAR and adopt the Petition's request to
9 ease the admission of medical records in FASTAR cases.
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11 **RESPECTFULLY SUBMITTED** this 1st day of May, 2020.
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13 /s/ Lisa M. Panahi
14 Lisa M. Panahi
15 General Counsel

16 Electronic copy filed with the
17 Clerk of the Supreme Court of Arizona
18 this 1st day of May, 2020.

19 by: Patricia Seguin
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